

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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MAY -6 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0026-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
FRANCISCO CUEVAS GALLEGRO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053483

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
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HOWARD, Chief Judge.

¶1 Petitioner Francisco Gallego seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged he was entitled to relief on various grounds, based on newly discovered material facts. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Gallego has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Gallego was convicted of theft of a means of transportation and third-degree burglary. The trial court sentenced him to mitigated, concurrent prison terms of ten and eight years. This court affirmed his convictions and sentences on appeal. *State v. Gallego*, No. 2 CA-CR 2006-0133, ¶ 24 (memorandum decision filed Apr. 27, 2007). Gallego filed a timely notice of post-conviction relief, *see* Ariz. R. Crim. P. 32.4(a), and his appointed counsel determined she could “find no issues for review” and requested that the court allow Gallego time to file a pro se petition.

¶3 The court granted counsel’s request, and Gallego thereafter filed a petition in which he alleged (1) he was entitled to relief because newly discovered evidence had come to light indicating one of the state’s witnesses, who had seen the car being stolen and had identified Gallego as the man who had driven away with it, “ha[d] been lying about [his] identity before and at trial”; (2) trial counsel had been ineffective in “miss[ing] the inconsistenc[y]”; and (3) the prosecutor “may have withheld material facts relating to the state[’]s witness.” Gallego’s claims were based on inconsistencies in police reports about the name the witness had given and a letter from his appellate counsel stating that trial counsel had “informed [him] he has learned since your trial [the witness] may have lied about his identity, and that he may have a criminal history that

was unknown at trial.” The trial court summarily denied relief, concluding the letter from counsel did not establish the state’s witness did in fact have a criminal history Gallego had been unaware of at trial and in any event, trial counsel had done “an adequate job of calling [the witness’s] credibility into question” and “the outcome of the case would not have been different had counsel cross-examined [the witness] as [to] inconsistencies in police reports regarding his name.” Gallego did not seek review of the dismissal of his pro se petition for post-conviction relief.

¶4 Approximately six months later, Gallego initiated another Rule 32 proceeding. He included with his notice of post-conviction relief an affidavit from trial counsel stating that, while at the county courthouse, he had seen the witness in a courtroom facing felony charges under a different name. And, counsel averred the witness had been “subject to Rule 11[, Ariz. R. Crim. P.,] proceedings” in that matter. Gallego also attached several documents from one of these matters to his notice, including a motion for a Rule 11 examination and the state’s allegation of a prior conviction. The trial court appointed counsel, who filed a petition for post-conviction relief arguing that this evidence constituted newly discovered material facts which entitled Gallego to relief under Rule 32.1(e)(1), Ariz. R. Crim. P., and that the prosecutor had committed misconduct and denied Gallego due process of law by failing to disclose the information about its witness.¹ The trial court again denied relief, concluding “[a]ll

¹Gallego also filed a “Notice of Motion and Motion for Leave of Court to Amend . . . Pleadings Pursuant [to] . . . Rule 32.6.” In that pro se document, he raised essentially the same arguments as those raised by counsel, but with the addition of a claim that counsel in his first Rule 32 proceeding had been ineffective. Because he does not argue that point on review, we do not address it. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain “the reasons why the petition should be granted” and “specific references to the record”).

the new information in this second Rule 32 petition was available by anyone exercising due diligence at trial or the time of filing the first Rule 32 petition” and Gallego’s claims were therefore precluded. It also pointed out that even if not precluded, the claims were not colorable because the evidence was “mere impeachment, irrelevant, and unlikely to alter the verdict,” and it concluded Gallego’s claim of prosecutorial misconduct failed because he had not shown the state had known that its witness had used a false name or that he and the man being prosecuted in the other proceeding were in fact the same individual.

¶5 On review, Gallego essentially reiterates the arguments he made below and argues it was “illogical and error” for the court to have concluded that he had failed to exercise due diligence in discovering the evidence about the witness’s identity while also finding there had been no way for the state to know its witness was lying about his identity. Although we disagree with some aspects of the court’s ruling, it did not abuse its discretion in determining Gallego had failed to state a colorable claim for relief.

¶6 As an initial matter, we note that Gallego did not set forth in his notice of post-conviction relief the reasons for not raising the claims or presenting the additional evidence in his previous petition. *See* Ariz. R. Crim. P. 32.2(b) (“When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive . . . post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition . . .”). The trial court therefore could have dismissed his notice summarily solely on that basis. *See id.* (“If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition . . . , the notice shall be summarily dismissed.”). In any event, we agree

with the trial court that Gallego failed to state a colorable claim for relief because his claims are precluded. *See* Ariz. R. Crim. P. 32.2(a)(2).

¶7 Gallego argues his claims are not precluded because they are based on newly discovered material facts. *See* Ariz. R. Crim. P. 32.2(b) (excepting claims based on newly discovered material facts from preclusion). Under Rule 32.1(e), “[n]ewly discovered material facts exist if,” *inter alia*, “[t]he newly discovered material facts are not . . . used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict.” Contrary to Gallego’s assertions, the evidence here—that the witness had prior felony convictions and had requested a Rule 11 evaluation in another proceeding—would solely have been used to impeach the witness’s credibility. Thus, in order to constitute newly discovered material facts, the evidence would have had to have substantially undermined critical testimony at trial in such a way that it would probably have changed the verdict. Ariz. R. Crim. P. 32.1(e)(3). The trial court did not abuse its discretion in determining Gallego had not established the evidence would have had such an effect.

¶8 The witness’s sister also identified Gallego as the man who had been driving the stolen car. Although Gallego makes broad assertions that the evidence of the other charges against the witness tainted her testimony as well, he has presented no evidence she had any knowledge of the other criminal proceeding. And, a Tucson Police officer involved in Gallego’s arrest testified he had seen Gallego and another person “looking over their . . . shoulders,” appearing nervous, and “scurrying” through a shopping center near where the stolen car was found with its ignition “punched out.” The car had a screwdriver in it and the man arrested with Gallego had two screwdrivers and a

glove in his pocket, despite it being late summer. He had thrown another glove down while being followed by the officer.

¶9 Finally, we note that although no questions of mental health were raised at trial, the fact that the witness had sustained a head injury, which was part of the basis for the Rule 11 motion, was brought out at Gallego's trial. In view of the other evidence presented at trial, we cannot say the trial court abused its discretion in determining the evidence probably would not have changed the outcome of the trial. Therefore, although we grant the petition for review, we deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge